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ABSTRACT

This document examines equal opportunity for women in athletic programs--one of the most closely scrutinized and least understood issues of Title IX. Areas considered are: (1) basic provisions of Title IX; (2) the self-evaluation requirement; (3) grievance procedures; (4) the "adjustment period"; (5) overall equal athletic opportunity; (6) student interest and ability in relation to compliance; (7) athletic funding; (8) equal athletic opportunity issues under Title IX; (9)equipment supplies and uniforms; (10) scheduling of games, practice times, season lengths, and number of games; (11) travel and per diem allowances; (12) opportunity of students to receive coaching; (13) academic tutoring and other services; (14) facilities--locker rooms, practice and competitive facilities; (15) medical, health, and training facilities; (16) housing and dining facilities; (17) publicity and public relations; (18)recruiting student athletes; (19) support services for men's and women's programs; (20) administrative structures; (21) athletic associations and sports governing organizations; (22) athletic policy; and (23) employment issues. (MM)

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TITLE IX: WHAT IT MEANS AND DOESN'T MEAN TO ATHLETIC PROGRAMS

by

Margaret C. Dunkle

Immaculata Conference: Women in Sports
November 11, 1976

Equal opportunity for women in athletic programs has surely been the most closely scrutinized and least understood issue of Title IX. Athtletics has become the symbolic cutting edge of this sweeping and important law. The opportunities that girls and women have on the playing fields reverberate throughout our schools and colleges -- in the classrooms, in the laboratories, and in the offices of administrators. What happens to the sports opportunities for girls and women at an educational institution both affects and reflects what happens to every girl and woman at an institution, even those who never want to get closer to the playing field than a physics lab.

Certainly many of the positive traits associated with athletic excellence are all too rarely associated with being a female -- achievement, aggresiveness, leadership, strength, swiftness, self confidence. In fact, often these positive traits are seen as being in contradiction with the role of women. Listen, for example, to the pre-Title IX (1971) decision of a Connecticut court judge in denying women the right to participate on a "male" cross country team, the only cross country team:

> The present generation of our younger male population has not become so decadent that boys will experience a thrill in defeating girls in running contests. . . . Athletic competition builds character in our boys. We do not need that kind of character in our girls, the women of tomorrow. . . .

What has brought women in sports to the forefront? Why are people so concerned today about women in sports? Partly the work that those of you concerned with athletics have been doing for years. Partly the increased flexibility of the roles of women and the expanded options from which they can choose. Partly Billie Jean King and Bobby Riggs.

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And partly that late blooming and much maligned law called Title IX of the Education Amendments of 1972.

Title IX: Basic Provisions

Just what is Title IX? What does it require? And how does it affect athletics? Although it has been labeled as "that sports law," Title IX prohibits sex discrimination in schools and colleges across the board -- from the admission of students, to the treatment of students once they are admitted, to the employment practices of an institution. It is the only sweeping federal law that prohibits sex discrimination against students.

The basic provisions of Title IX are wrapped up in one sentence: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." Although Title IX has been the law of the land since 1972, its regulation did not go into effect until July 1975.

This prohibition against discrimination applies to every educational institution which receives Federal money -- preschools, elementary and secondary schools, vocational schools, colleges and universities, graduate schools and professional schools. There are some exemptions to the law, but these exemptions are not relevant to discrimination in athletics. It is more important to know what is not exempt regarding athletics, rather than to focus on other areas which are exempt or treated differently. For example: the so-called "revenue producing" sports are not exempt and football and basketball are not exempt.

Title IX is patterned after Title VI of the 1964 Civil Rights Act, which prohibits discrimination against the beneficiaries of programs receiving federal money on the basis of race, national origin or color, but not sex. Like Title VI, Title IX is enforced by the Office for Civil Rights of the Department of Health, Education and Welfare. It provides parents, teachers and students with the legal tool to protest sex discrimination. If an institution does not comply with the provisions of Title

IX, the government has the power to dealy federal money, take back federal money previously awarded, or debar an institution from receiving future contracts of grants from the government. Complaints can be made by writing to the Secretary of HEW.

The Self Evaluation Requirement

The Title IX regulation requires that institutions conduct a self evaluation of their programs and activities, including athletics, by July 21, 1976. Although a number of institutions have already completed some sort of evaluation, the process of self evaluation in athletics is a continuing process.

A soon-to-be-released publication which I authored, Competitive Atheltics: In Search of Equal Opportunity, is aimed at providing institutions with step-by-step guidance in conducting a thorough self evaluation and in adjusting its athletic program so it provides equal opporutnity. This publication is now being printed by the U.S. Office of Education and should be available either through the Women's Program Staff, U.S. Office of Education or through your congressional representative.

If an institution finds that it is not providing overall equal opportunity, it must modify various aspects of its athletic program (ranging from the selection of sports to the provision of equipment and other services) so that the women's and men's athletic programs, when taken as a whole, provide equal opportunity to both female and male students. This information must be kept on hand at the institution for a least three years.

Title IX Grievance Procedures

The Title IX regulation also requires that institutions "adopt and publish grievance procedures providing for prompt and equitable resolution" of Title IX complaints. Hence, a student (or group) which believes that the institution is not providing equal athletic opportunity has the option of either pursuing her or his compliant through the institution's grievance procedure or filing a complaint directly with HEW. It is important to note that, although institutions must have a grievance procedure, students (or employees, for that matter) do not have to use it.

The "Adjustment Period" for Athletics

Athletic and physical education programs are unique under Title IX because the regulation does not require immediate full compliance. Rather, colleges and secondary schools are given up to three years (until July 21, 1978) to comply fully with the provisions of the regulation. (Elementary schools had a one year adjustment period, which ended on July 21, 1976.)

If an institution cannot comply immediately with the athletic provisions of Title IX, it must be able to justify its use of the adjustment period by being able to demonstrate that there are real obstacles or barriers for achieving immediate athletic parity for students of both sexes. Also, it must be able to demonstrate that it is taking steps, with specific timetables for implementation, to overcome those barriers.

Overall Equal Athletic Opportunity

Clearly Title IX means many things for athletics. But Title IX has been unjustly accused of doing evil things to athletics that it will, in fact, not do. In testimony before the Subcommittee on Post Secondary Education of the U.S. House of Representatives, then - Secretary of HEW Casper Weinberger pointed out what Title IX and its regulation do not require:

(1) It [i.e., the Title IX regulation] does not require equal aggregate expenditures for members of each sex or for male and female teams.
(2) It does not require two separate equal facilities for every (or any) sport.
(3) It does not require women to play football with men.
(4) It will not result in the dissolution of athletics programs for men.
(5) It does not require equal moneys for athletic scholarships.
(6) It does not require coeducational showers, lockerrooms and toilet facilities.
(7) It does not mean the National Collegiate Athletic Association (NCAA) will be dissolved and will have to fire all of its highly vocal staff.

In the area of athletics, Title IX poses many complex questions, but mandates few absolute actions by institutions. Indeed, the law and its regulation grant institutions considerable flexibility in developing nondiscriminatory athletic programs tailored to meet the needs of their students. It does not require colleges

to duplicate their men's program for women or to offer exactly the same sports in exactly the same fashion for both women and men. Nor does it equate equal opportunity with equal penny-for-penny expense. Rather, it requires overall equal athletic opportunity, with specific athletic offerings being determined primarily by the interests and abilities of female and male students.

The overall equal athletic opportunity provisions of Title IX apply to all sports, including contact sports and competitive sports which the institution offers on a single sex basis. Also, these equal opportunity requirements are independent of the source of funding for a particular team or athletic program. Hence, the fact that a woman's program is primarily supported by the women's physical education department, while the men's program is primarily supported by student fees or an athletic booster club does not alter the institution's overall obligation to provide equal opportunity. It should be kept in mind when complying with the Title IX requirement for equal athletic opportunity that the ultimate responsibility for providing equal athletic opportunity lies with the institution and its chief executive officer, not with the individual women's and men's athletic departments.

Title IX allows institutions to operate separate teams for women and men for contact sports or when selection for teams is based on competitive skill. Even when an institution offers separate teams, however, it must not discriminate on the basis of sex in providing equipment or supplies, or in any other manner.

The standards for separate teams are somewhat different for contact sports and noncontact sports. The Title IX standards for noncontact sports vary, depending on whether or not overall athletic opportunities for women or men at the institution have been limited in the past: if an institution has only one team in a noncontact sport (either for women or for men, but not both), it must allow the other sex to compete for a sport on this team only if overall athletic opportunities at the institution for the "excluded sex" have been "limited" in the past. In making this determination, it is important for institutions to examine athletic opportunities overall,

rather than on a sport-by-sport basis. If, for example, an institution has only a "men's" team in a noncontact sport (such as track), it must allow women to compete for a spot on this team if overall (not just track) athletic opportunities for women at that institution have been limited in the past.

For contact sports (such as football) an institution may prohibit a woman from trying out for the "men's" team, even if overall athletic opportunities for women at the institution have been limited in the past. Similarly, a man could be prohibited from trying out for the women's basketball team (since the regulation defines basketball as a contact sport), even if he could show that the overall athletic opportunities for men at that institution had been limited in the past. The Title IX regulation defines contact sports as boxing, wrestling, rugby, ice hockey, football, basketball and "other sports the purpose or major activity of which involves bodily contact." Sports such as softball and baseball are not contact sports under Title IX.

Student Interest and Ability: The Touchstone of Athletic Compliance

"Whether the selection of sports and levels of competition effectively accomodate the interests and abilities of members of both sexes" has become the touchstone of institutional compliance with the "equal athletic opportunity" provisions of Title IX. Hence, both in determining what athletic opportunities to offer women and men, and in being able to justify differences between women's and men's programs as nondiscriminatory, institutions must have some reliable measure of what the athletic "interests and abilities of students" are.

Although the Title IX "Sports Memorandum" states that institutions "should draw upon the broadest possible base of information" in determining student interests and abilities, neither the memorandum nor the regulation mandates a specific method or process for conducting the evaluation. Although the process should be comprehensive, institutions should keep in mind that they are not required by Title IX to satisfy all of the real or imagined athletic interests or abilities of all students. Nor are they required to make exactly the same sports or opportunities available. Rather, Title IX requires them to satisfy the interests and abilities of women to the same degree as they

satisfy the interests and abilities of men.

The Funding of Athletics

There is perhaps no other area which is as widely discussed and little understood as the funding of intercollegiate athletics. Entirely apart from Title IX, many institutions are now taking a closer look at their athletic budgets because of inflation, rising costs, declining student or spectator interest and/or declining student enrollments. In his 1974 report on intercollegiate athletics to the American Council on Education, George Hanford reported that there is only "a small and statistically insignificant positive relationship" between the institution's success in athletics and its success in securing state appropriations. Indeed, "the impact of winning teams on the financial disposition of legislators is virtually imperceptible." Similarly, "it appears that private colleges that have deemphasized or abandoned football have not seriously suffered from loss of alumni financial support."

Although whether or not a sport makes a profit is clearly not the standard for determining equal opportunity, a great deal of speculation about the "profitability" of the so-called "revenue producing" sports has accompanied discussions of Title IX and athletics. For example, in testifying before the Senate Subcommittee on Education, Donna Lopiano (director of intercollegiate athletics for women at the University of Texas) provided the following insight into the economics of big time college athletics:

> Let's take a closer look at [University of Texas'] $2.4 million men's athletic program which is often considered a prime example of an athletic program supported through income derived from big-time football. Believe it or not a good case can be made that football at the University of Texas at Austin under one of the finest football coaches in the country is not even profit making. When the cost of administrative and support personnel salaries, coaches salaries, wages, operating expenses, scholarships, utilities, public relations, office supplies, telephone, salary benefits, insurance, maintenance, programs, cheerleaders, band, astroturf and allocation for budget adjustment costs are taken into consideration the $1.6 million in revenues solely produced by UT football are also solely spent on that same football program which costs approximately $1.6 million to run. If you go one step further in the assessment of costs to the University and consider the amortization of a 75,000 seat stadium, football is costing the University of Texas a great deal more money than the revenue it purportedly generates. We may then conclude that the total athletic program is not dependent on revenues derived from football gate receipts but is either dependent on $450,000 in income which is derived from an optional $20 student fee which provides

> free admission to all athletic events or from the money the University provides for capital expenditures which in turn frees other monies for operating expenses utilization. What on the surface gives the illusion of profit or net income, is nothing more than cash flow being used for operating expenses. It all depends on how you wish to interpret the data. We know that we can use statistics to support almost any proposition. What I am suggesting is that the Tower Amendment [regarding the "revenue producing" sports] has found it convenient to maintain the myth that big-time football and basketball are not only revenue producing, but profit making enterprises which support all other teams in the athletic program. To accept this assumption as valid would be a grave error. We are simply not used to perceiving University support via capital expenditures as a cost factor in our programs.

The Title IX regulation's coverage of athletics is premised on the assumption that an institution can provide equality of opportunity without exact equality of expenditure. The regulation makes clear that institutional compliance with the Title IX standards in athletics does not demand dollar-for-dollar matching expenditures for each sex. (Nor, for that matter, does the regulation <u>forbid</u> an institution from implementing a dollar-for-dollar standard on its own.) Rather, the <u>opportunities</u> provided for women and men are the major criteria for determining whether or not an institution is providing equal athletic opportunity under the standards set forth in the Title IX regulation. While the Title IX regulation explicitly does not require equivalent expenditures for each sex, disparities in expenditures may be one factor in determining whether or not opportunities are equal.

In evaluating inequities in opportunity which result from inequities in funding, institutions should keep in mind that they must compare the <u>total women's program</u> to the <u>total men's program</u>. That is, <u>all</u> male sports (including basketball, football and other so-called "revenue producing" sports) must be compared with <u>all</u> female sports to determine if, overall, the institution is providing equal opportunity. In assessing whether an institution is complying with the athletic provisions of Title IX, <u>the so-called "revenue producing" sports and funds derived from private sources are considered in the same manner as other sports and funds</u>. Also, <u>contact and noncontact sports are evaluated together</u>, not separately, in all equal opportunity comparisons under Title IX.

The process of undertaking and completing such an analysis is not likely to be simple. At many institutions the funding of athletics is intricately interwoven with

the funding of other aspects of the institution and on many campuses the sources of funds for the women's athletic programs are dramatically different from those for the men's program. For example, funds for athletic activities (for women and/or men) may come from student activity fees, a line item in the institution's budget, a special appropriation from the state legislature, revenues from television or radio contracts, athletic booster clubs, institutional athletic foundations, earmarked contributions, assessments of students for "capital improvements" (e.g., an athletic stadium), ticket sales or the institution's physical education budget. Although the different funding patterns are practically limitless, it is important to remember that the source of financing is not relevant in determining an institution's coverage by, or compliance with, Title IX.

Similarly, the level and pattern of expenses for women's and men's sports often differ greatly, even within the same institution or for the same sport. In George Hanford's 1974 study for the American Council on Education, he estimated that the average budget of women's departments was equal to only two percent of the men's budgets. Although the budgets for women's athletics have generally increased somewhat since then, they still clearly lag far behind the budgets for men's athletics on most campuses.

In short, although money is not Title IX's measure of equality, an institution must look at where its sports money comes from and goes if it is to meaningfully evaluate equal opportunity.

EQUAL ATHLETIC OPPORTUNITY ISSUES UNDER TITLE IX

If Title IX doesn't define equal opportunity in terms of money, how does it describe equal opportunity? Although the guidance in the Title IX regulation regarding this is far from perfect, it does specifically state that institutions must look at a number of specific areas in assessing whether or not their athletic programs comply with the law. For example, a separate section of the regulation addresses standards for equal opportunity regarding athletic scholarships and other financial aid.

Additionally, an "athletic laundry list"spells out specific areas that will be considered in determining equal opportunity:

- The provision of equipment and supplies;
- Scheduling of games and practice time;
- Travel and per diem allowance;
- Opportunity to receive coaching and academic tutoring;
- Assignment and compensation of coaches and tutors;
- Provision of locker rooms, practice and competitive facilities;
- Provision of medical and training facilities and services;
- Provision of housing and dining facilities and services;
- Publicity.

Although the athletic laundry list may at first appear to be comprehensive, it does not include all factors which might affect equal athletic opportunity for women and men in any given institution. The enumeration of items on the laundry list is not intended to limit the institution's consideration of equal opportunity to those areas only. Indeed, HEW's Office for Civil Rights might well consider other factors or items during a particular compliance investigation or review. These "other factors" include:

- Recruiting athletes
- Awards and recognition for athletic excellence
- Other benefits and services to athletes
- Other support services for the women's and men's programs
- The relative roles of women and men in the administrative structure, in athletic associations and in developing athletic policy
- And, last but not least, issues related to employment of persons running athletic programs for women and men must be considered.

Let's take a closer look at some of these issues.

Financial Aid to Athletes: Athletic Scholarships

Title IX does not address the desirability of providing financial aid to athletes

per se. However, many institutions are finding that their efforts to reconcile the often widely different practices and philosophies of their women's and men's athletic departments will lead them to reassess the overall role of athletic scholarships in their institution. As a result of this type of assessment, some institutions are substituting scholarships based on "need" for traditional "athletic ability" scholarships, pointing out that basing financial aid on need is one way to assure nondiscrimination. Need based scholarships for both women and men have also been advocated as a way to reduce the cost of extensive intercollegiate athletic programs.

Title IX does not require institutions to duplicate their men's athletic financial aid program for women. Nor does it deny individual institutions the flexibility to develop their own women's and men's athletic programs, as long as the institution's total programs ensures both women and men an equal opportunity to compete in athletics in a meaningful way. Title IX compliance regarding athletic financial aid is determined by the totality of the financial aid available to participants in the women's and men's athletic programs, rather than by the specific aid provided to each student or in each sport.

Hence, Title IX apparently does not bar somewhat different forms or amounts of financial aid awards to individual female and male athletes, as long as the totality of this aid provides "reasonable opportunities to members of each sex in proportion to the number of students of each sex participating" in intercollegiate athletics. The criteria for the award of athletic scholarships may legitimately vary for women's and men's athletics, as may the sports in which scholarships are awarded, so long as the overall effect is not discriminatory. Title IX may also permit an institution to offer separate athletic scholarships for separate female and male teams, as long as it also assures overall equal opportunity for both sexes (i.e., "reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex in proportion to the number of students of each sex participating" in intercollegiate athletics).

Financial aid to student athletes varies enormously from institution to institution. For example, at some institutions the men's athletic department may have total control over the award of athletic financial aid to men, while financial aid to women athletes is handled through the college financial aid office. Similarly, the source of funds for athletic financial aid varies enormously. In some colleges this aid is a part of the general institutional scholarship fund and does not appear in the athletic budget at all; in some colleges it is a line item in the athletic department budget; in others all or part of this aid comes from a "booster club" or affiliated "athletic corporation"; and in still other institutions this aid comes from several sources simultaneously. While differences in the source of funds for athletic scholarships may make the analysis of equal opportunity complex in some instances, the source of financing is not relevant in determining an institution's coverage by, or compliance with, Title IX.

Although many institutions award the majority of all athletic financial aid in two sports, male football and male basketball, for Title IX purposes, (male) basketball and football scholarships are not treated differently from financial aid to other male athletes. Similarly, for financial aid purposes, contact and noncontact sports cannot be treated separately, nor can athletic aid in the so-called "revenue producing" sports be evaluated separately from athletic aid in "non-revenue producing" sports. In evaluating whether or not it is providing equal athletic scholarship opportunity under Title IX, an institution must compare <u>all</u> such aid to women with <u>all</u> such aid to men.

In determining or evaluating the basis on which to award financial aid to students, institutions should also pay special attention to HEW's caution in the "Sports Memorandum" that, if standards for the award of this aid are not "neutral" in both "substance" and "application," the institution must use different (and nondiscriminatory) standards for the award of aid. In measuring "athletic ability" or "athletic proficiency," institutions must adopt separate norms or measures for women and men if the application of a single standard would "disadvantage" women.

Equipment, Supplies and Uniforms

There have often been great differences in the equipment, supplies and uniforms available for women's and men's competitive athletics, even for the same sports. In some instances the lack of equipment has had a "chilling effect" on the development of sports opportunities for women. In other instances, the lack of adequate equipment has increased the chance of injury or harm to female athletes.

Institutions may not discriminate on the basis of sex in providing necessary equipment, supplies and uniforms. Title IX does not, however, require that an institution buy exactly the same equipment for women and men, or that it replace equipment for women's and men's teams at exactly the same time (even though the equipment for one sex was worn out and that used by the other sex was not). Widely different standards for buying or replacing equipment for women's and men's teams would, however, not be in line with Title IX.

Scheduling of Game and Practice Times, Season Length, and Number of Games

The inability of women's teams to practice and compete can, perhaps more than other factors, dry up burgeoning "interest" in athletic competition by women. Oftentimes the women's teams have been "allowed" to use game and practice facilities only when the men's teams did not want to use them. For example, women's teams have often been scheduled to practice or compete at inconvenient times or "off hours" in order to leave the most desirable facilities and times "free" for competition by men. Moreover, male teams have sometimes been permitted to have longer practice sessions or seasons at the expense of either practice or competitive opportunities for the women's teams. Additionally, the process for scheduling games, as well as the degree of lead time in scheduling games, has often been quite different for women's and men's teams.

Travel and Per Diem Allowances

Often the amount of travel, the mode of travel, the amount of money allocated for food and lodging, and the source of these funds have been strikingly different

for women's and men's teams. For example, women's basketball teams have sometimes had to provide their own transportation and pay for their own meals when traveling, while their male counterparts have traveled first class across the country at the institution's expense.

In determining whether or not it is providing equal opportunity in this area, an institution must first examine the per diem funds being allocated for meals and lodging to various female and male teams. Then, it is necessary to examine the travel patterns of different teams (i.e., the distances traveled and the number of trips) to determine if differential scheduling decisions are having the result of providing unequal opportunity on the basis of sex.

Opportunity of Students to Receive Coaching

While Title IX does not require that an identical number of coaches be assigned to women's and men's teams regardless of the nature of the sports or the number of participants, it does require "equal opportunity." That is, decisions about such items as the number of coaches per team must be determined by objective standards (rather than by the sex of the participants in a particular athletic program).

Women athletes have often had fewer coaches, coaches with less training, and fewer "coaching hours" than their counterparts on male teams. Also, women's teams have generally not been afforded the same level of "assistant coach" support as the men's teams.

Since programs for female students are run primarily by women (and programs for male students are run primarily by men), there is often a close relationship between the opportunity of female students to receive coaching and the opportunities afforded women coaches. However, the sex of a person cannot be used as a justification to deny students the opportunity to receive coaching.

Academic Tutoring and Other Academic Services

Some institutions provide academic tutoring and other services to assist the student athlete academically. In some institutions these services have traditionally

been available to male athletes (generally football and/or basketball players), but not to female athletes. In some instances there has been sex discrimination against the tutors or persons providing these services.

Facilities: Locker Rooms, Practice and Competitive Facilities

Women athletes have often been treated as second class citizens in terms of the facilities which the institution has provided to them. In the past it has been commonplace for the old gymnasium to be "retired" to the women and for women's teams to have fewer and less desirable competitive, practice locker and shower facilities. In some instances the lack of bathroom, shower or locker facilities (or the lack of supervision in these facilities) has been used as a justification for denying women equal opportunity in athletics or in other areas. Although single sex use of these facilities is permissible, it is not similarly permissible to use this lack of facilities as a justification for discrimination.

Under Title IX all facilities must generally be available without discrimination on the basis of sex. Locker rooms, toilets, showers and other facilities available to women and men must be comparable. A close inspection of the facilities which women's and men's teams use, as well as a careful analysis of the access of each female and male team to various facilities and any related services, is necessary in order to assess whether or not there is discrimination in this area.

Medical, Health and Training Facilities and Services

Institutions sometimes provide special medical and/or training facilities and services to athletes. Often, however, these services have been preferentially available to certain male teams. For example, the institution's student health service may provide "free" medical care to the male (but not the female) basketball team or the male (but not the female) team may be provided with special health insurance.

Institutions must look closely at all medical and health insurance, the availability of (and services provided by) trainers, services provided to athletes by the

college health service, and medical requirements and provisions to determine if the institution is providing equal opportunity.

Housing and Dining Facilities and Services

Some institutions have provided male athletes with special housing and/or dining services and facilities. In some instances living in "athletic dormitories" is a condition of receiving athletic scholarship assistance in certain sports and occasionally athletic departments actually operate or own housing or dining facilities specifically for athletes.

Such special athletic housing and dining facilities are generally unique to certain male sports. On most campuses female athletes use the same housing and dining facilities available to non-athlete female students.

An institution will need to examine a number of aspects of housing and dining services and facilities to determine if those available to female athletes are comparable to those available to male athletes. In order to determine this, an institution would, for example, wish to first determine if any athletes receive any special, different or preferential treatment regarding either housing or dining services or facilities. If some or all athletes are treated differently in this regard, it is then necessary to evaluate and compare in some detail the services and facilities available to female and male athletes to determine how best to provide equal opportunity.

Publicity and Public Relations Services

Some institutions provide publicity and/or public relations services for athletic teams. Although these efforts and services have traditionally been available to male teams, but not to female teams, a number of institutions have begun to provide these services to female teams in the last few years.

Recruiting Student Athletes

Title IX links the recruitment process to admission results. Hence, those institutions which are exempt from the Title IX requirement not to discriminate in admissions (such as private, but not public, undergraduate colleges) are similarly

exempt from Title IX's provisions regarding nondiscriminatory recruitment.

The Title IX regulation allows institutions (including those governed by the admissions provisions of Title IX) some flexibility in the specific recruitment process and procedures they use, so long as the overall effect of recruitment efforts on the admission of women and men is not discriminatory. If however, the recruitment process leads to discriminatory admissions or if any admissions criteria (including athletic ability) has a "disproportionately adverse effect" on the basis of sex, then covered institutions would need to revise the recruitment process and/or the admissions criteria.

Other Benefits and Services to Student Athletes

The range of other services and benefits which are occasionally provided to some or all student athletes is extensive: free or reduced admission to athletic events, priority use of campus recreational facilities, the availability of bands and/or cheerleaders for games and rallies, preferential or different employment opportunities, opportunities to purchase "varsity" items (such as jackets or jewelry), eligibility for membership in varsity clubs, laundry or maid service, etc.

Where such services and benefits are offered, they are generally available to male athletes more readily than to female athletes. In evaluating if it is providing equal athletic opportunity, an institution should evaluate these "fringe" benefits of the athletic program, in addition to the direct offerings of the women's and men's program.

A special note is in order regarding a couple of these "other services and benefits." Although preferential employment opportunities for all student athletes are not prohibited by Title IX, an institution would not be in compliance with either the employment provisions of Title IX or other federal laws if it provided employment opportunities differentially to female and male athletes because of their sex. Additionally, equal opportunity for such areas as bands and cheerleaders should be evaluated in two respects: first, the availability of these services or allied activities for both women's and men's athletic events and, second, the opportunities which students of both sexes have to

participate in these allied activities. (For Title IX purposes, participation in these activities is covered by the Title IX requirements regarding extracurricular activities, not by the athletics section of the regulation.)

Other Support Services for the Women's and Men's Programs

The "support services" available to an athletic program can have a substantial impact on the extent and quality of the athletic offerings for women and men. The coach of a woman's athletic team cannot be reasonably expected to match the performance of her male counterpart if she and he have access to widely different support services. For example, the energy or time she and he can devote to coaching is certainly not equal if she must type and file her own letters (while he has a full time secretary), if she must walk three blocks to use a xerox machine (while he has one in his office), if she has to wait two weeks to have her team's schedule duplicated through the university's publication department (while his teams have top priority), if she must keep the athletic program's financial records (while he has an accountant to do this), and if she must scout opposing teams (while he has a paid full or part time scout). While the disparities at many institutions are not this great, these examples serve to illustrate how the presence or absence of support services can affect the overall scope and adequacy of athletic opportunities for women.

Administrative Structure of Women's and Men's Programs

At present the majority of colleges operate their women's and men's athletic programs separately. Often these departments are quite different in philosophy, emphasis, structure and historical development. While these two traditions are not necessarily contradictory, they have often led to the development of programs for women and men in the same institution which are strikingly different. Title IX does not define these differences as inherently discriminatory. The overall provision of equal opportunity is what determines whether or not an institution's athletic program is in compliance with Title IX. Title IX permits institutions to maintain multiple administrative structures so long as these structures do not lead to discriminatory

programs or discriminatory employment opportunities.

In order to assess overall equal opportunity, however, it is necessary to examine the organization and scope of women's and men's athletic programs closely. Widely divergent structures, responsibilities and opportunities may require that an institution realign the administrative structures of its women's and men's programs.

Many women in athletics are concerned that a merger of the administrative structures for women's and men's athletics would mean submerger. They fear that women would both be demoted to "assistants to the athletic director" and lose whatever control they now have over women's sports. They point to departments which have merged, noting that the programs and philosophies of women's athletics have often lost ground as a result of the merger. They also draw analogies between their current situation and what happened to many black educators when they were demoted or terminated when black and white school systems were desegregated after the passage of the 1964 Civil Rights Act.

If, however, an institution is exploring merging the administration of the women's and men's athletic programs the "Sports Memorandum" notes that it must undertake a comprehensive study to "assess the effects on employees" of the proposed change. Additionally, the institution should thoroughly explore the possible "adverse effects" of merger on the athletic opportunities for women students and the programmatic values and philosophy of the women's and men's programs.

In conducting this assessment, an institution should solicit the views and advice of female and male administrators and athletes, as well as other institutions which have faced similar questions. Then it should develop a comprehensive written and public implementation plan and schedule periodic reviews of the plan to assure that the rights of women (or men) are not compromised. If any change in administrative structure has a "disproportionately adverse effect" on women, it would violate Title IX.

Examples of changes which would have a "disproportionately adverse effect" on women might include the following: if merging the administration of the women's and men's programs resulted in the automatic demotion of the current women's athletic director

to "assistant director"; if women as a group were fired, demoted or otherwise in a less favorable employment position as a result of the merger; if merger resulted in fewer jobs in coaching or athletic administration for women; or if the practical effect of merger were to require women to accept the "male model" of athletics.

If an institution retains separate administrative structures for women's and men's athletics, it should evaluate these structures to determine if they provide equal employment opportunities regardless of sex and if such factors as their role, resources and access to top administration are relatively equal. In a number of institutions the administrators of the women's program do not have the same support services, access to the president, etc. as the administrators of the men's program.

Athletic Associations and Sports Governing Organizations

Currently there are different national associations governing intercollegiate competition for women's and men's athletics. The same reasoning that HEW outlined in the "Sports Memorandum" regarding administrative structures for the conduct of women's and men's athletics can also be applied to separate athletic associations governing women's and men's athletics. That is, "institutions are not precluded" from participating in such separate associations if any separate women's and men's athletic teams exist, and proposed changes in these affiliations should be carefully assessed to determine the effects on students and employees. The interests and abilities of female and male students, as well as the levels of competition and selection of sports, should be considered in evaluating any proposed changes in association, membership or affiliation. Changes which have a "disproportionately adverse effect" on women should be avoided.

Title IX does not deny individual institutions the flexibility to develop their own women's and men's athletic programs, as long as the institution's total program ensures both women and men an equal opportunity to compete in athletics in a meaningful way. However, membership in sports governing associations does not change the institution's obligation to provide both overall equal athletic opportunity to students and

equal employment opportunity regardless of sex.

The Development of Athletic Policy

Although the regulation does not directly address the issue of sex bias in the development of athletic policy, it implicitly acknowledges the importance of non-discriminatory policy development to overall equal opportunity by permitting separate administrative structures for women's and men's sports.

Perhaps one of the simultaneously least tangible and most important aspects of equality within women's and men's athletic programs is the relative power and decision making authority of the women's and men's athletic programs. In many instances, in part because of the different administrative structures which have grown up around separate programs, there are striking differences regarding how athletic policy is developed and implemented for women and for men. For example, in some institutions, policy and budget decisions regarding men's athletics are reviewed only by the president, while policy and budget decisions regarding women's athletics in that same institution must be approved by one (or several) deans or other administrators.

Because the women's athletic program is often dwarfed by the men's program in scope, power and decision making authority, some women in athletics fear that immediate merger or the immediate development of a unitary policy for all aspects of athletics would require them to accept the "male model" of athletics, a model which some find inconsistent with their athletic practices and/or sport philosophy. Athough Title IX does not require that institutions develop athletic policy in exactly the same fashion for women and men, marked differences in how policies are developed almost always point to marked differences in opportunities.

Employment Issues Under Title IX

Discrimination against women athletic administrators and coaches has, perhaps more strikingly than any other employment discrimination, a dual impact: in addition

to discriminating against the woman employee, the woman student suffers as well because college athletics are often segregated by sex. For example, if the coach of the women's basketball team also has to coach field hockey and teach two classes, she cannot be expected to provide the same quality of coaching to her female students that the coach of the men's basketball team (who coaches basketball full time and has three assistant coaches) is able to provide to his male students.

It has not been uncommon for women coaches, administrators, officials and other personnel employed by the women's athletic department to receive less pay or fewer benefits than their male counterparts. Although such discriminatory practices have clearly violated federal (and often state) law, they have not been vigorously challenged until recently. The main criteria for evaluating whether there is equal pay for equal work are the amount of skill, effort and responsibility involved in the job. There have been decisions under the Equal Pay Act in which the courts have, for equal pay purposes, compared the salaries of female and male coaches in similar, as well as identical, jobs (e.g., comparing a female softball coach to a male baseball coach). Moreover, if male coaches as a group are consistently paid at a higher rate than female coaches as a group, the question of a pattern of discrimination arises.

Also, the conditions of employment have often been quite different for persons (generally women) hired to coach women and persons (generally men) hired to coach men. For example, the coach of the women's basketball team might also be required to coach tennis and/or teach in the physical education department, while the coach of the men's basketball team devotes full time to coaching basketball.

In the past many athletic programs have followed a policy of hiring only women to coach women and only men to coach men. However, it is becoming increasingly clear that such a distinction is not permissible under the legislation prohibiting employment discrimination, including Title IX.

A word of caution is in order regarding the criteria which an institution uses for hiring coaches. Because of past discrimination and limited opportunities, women often have not had the same opportunities as men to amass the experience or credentials which institutions often use to evaluate coaching proficiency. For exampe, a number of seemingly neutral criteria (such as playing on a championship intercollegiate team or being recommended by a prominent football coach), which may be predictive of coaching success for men, are not likewise predictive of coaching success for women (since there have been fewer championship events for women and since football coaches are unlikely to know the women athletes on campus). Similarily, hiring "overqualified" candidates (e.g., candidates who have twenty years of coaching experience) may lead the institution to hire only male coaches, since there have been few coaching jobs for women until recently. Indeed, if such criteria were used to make hiring decisions, they would undoubtedly exclude most women, including many superb women coaches, from consideration from the job. Using criteria which have a disproportionate impact on women which cannot be justified by business necessity might well be ruled discriminatory under the various laws prohibiting sex discrimination in employment. Hence, institutions may have to look for alternative measures which are predictive of coaching ability for women, as well as men.

Should it find employment discrimination, an institution must remedy it, whether by raising the salaries of women to the level of men in comparable jobs, equalizing fringe benefits or altering job ladders so that women are not disadvantaged. (Note that lowering, rather than raising, salaries to remedy discrimination is not acceptable under the law.) Even if the institution can demonstrate overall "equal athletic opportunity" for students, it cannot legally continue employment discrimination. The <u>three year "adjustment period" that applies to athletic programs affecting students does not apply to EMPLOYMENT discrimination in these programs</u>.

* * *

There are many issues which must be examined in evaluating equal athletic opportunity. The evaluation and the changes required may sometimes be painful and may sometimes be expensive. It is important to keep in mind that the pain or the expense of changing is a direct sign of how great the discrimination has been in the past; it is a direct sign of the extent to which women's sports opportunities have been subordinated to those of men; it is a direct sign of the extent to which women (and their parents, through tax and tuition dollars) have been subsidizing male sports for years.

We are now at a unique moment in history -- a moment which all people who care about our daughters as much as our sons can grasp to right inequities of the past. The opportunity now exists to rid ourselves of outdated double standards in our schools -- to get rid of a mentality that reveres male athletes as "real men" and laughs at female athletes as biological misfits (who, at best, must be taking male hormones). To get rid of a mentality that regards women athletes as cut little things that decorate the gym and hails boy athletes as "the leaders of tomorrow."

The athletic double standard is on its way out. Women have found that they like exercise. And women have found that rocking the boat is much better exercise than rocking the cradle. Indeed, they have found that exercising their rights can help knock out the wrongs of the past.

Note: Portions of this paper are patterned after Competitive Athletics: In Search of Equal Opportunity, written by Margaret C. Dunkle and published by the U.S. Office of Education.

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TITLE IX SECTIONS APPLYING TO SPORT

Athletics

(a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by recipient, and no recipient shall provide any such athletics separately on such basis.

(b) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose of major activity of which involves bodily contact.

(c) *Equal opportunity.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider among other factors:

(i) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes:

(ii) The provision of equipment and supplies;

(iii) Scheduling of games and practice time;

(iv) Travel and per diem allowance;

(v) Opportunity to receive coaching and academic tutoring;

(vi) Assignment and compensation of coaches and tutors;

(vii) Provision of locker rooms, practice and competitive facilities;

(viii) Provision of medical and training facilities and services;

(ix) Provision of housing and dining facilities and services;

(x) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Director may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

(d) *Adjustment period.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the elementary school level shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the secondary or post-secondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.

Physical Education

A recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis, including health, physical education, industrial, business, vocational, technical, home economics, music, and adult education courses.

(a) With respect to classes and activities in physical education at the elementary school level, the recipient shall comply fully with this section as expediciously as possible but in no event later than one year from the effective date of this regulation. With respect to physical education classes and activities at the secondary and post-secondary levels, the recipient shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.

(b) This section does not prohibit grouping of students in physical education classes and activities by ability as assessed by objective standards of individual performance developed and applied without regard to sex.

(c) This section does not prohibit separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

(d) Where use of a single standard of measuring skill or progress in a physical education class has an adverse effect on members of one sex, the recipient shall use appropriate standards which do not have such effect.

(e) Portions of classes in elementary and secondary schools which deal exclusively with human sexuality may be conducted in separate sessions for boys and girls.

Athletic Scholarships

(1) To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.

(2) Separate athletic scholarships or grants-in-aid for members of each sex may be provided as part of separate athletic teams for members of each sex to the extent consistent with this paragraphs and § 86.41 of this part.